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No. 10-57

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BRUCE MARKS and MARKS, LLC
d/b/a MARKS & SOKOLOV, LLC,

Petitioners,

v.

ALFA GROUP a/k/a CROWN FINANCE FOUNDATION,
ALTIMO HOLDINGS & INVESTMENT LTD,
and FINANCIAL DYNAMICS LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *ii* of their Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Defendants do not dispute that seven majority circuits sustain personal jurisdiction for intentional torts which "individually target" residents with the *intent* of harming them within the forum regardless of where communications are directed under the "effects" test enunciated in *Calder v. Jones*, 465 U.S. 783 (1984). Nor do they dispute that the three minority circuits require (1) communications to be directed to the forum; (2) communications concern forum related conduct; and/or (3) a "unique relationship" exists between plaintiff's profession and the forum – an "effect plus" which denies Americans in these Circuits a home forum. Rather than contesting the Circuit split, Defendants' opposition rests on three points:

First, Defendants argue that the "individually targeted" test would impose a rule that there is always personal jurisdiction in a defamation suit when the plaintiff is known to reside in the forum. However, this argument misstates the "individually targeted" test which sustains jurisdiction not merely because the plaintiff is known to reside in the forum, but because the defendant's *intent* is to cause harm in the forum, hardly the normal defamation matter.

Second, Defendants argue this case was properly decided under *Calder*, but offer no basis for the Third Circuit's requirements that jurisdiction be determined based on the content of communications and a "unique relationship" between the plaintiff's profession and the forum. Rather, Defendants' sole justification for the Third Circuit test is grounded on the requirement that communications be directed to the forum –which the majority Circuits reject, particularly in light of technological development.

Third, Defendants attempt to explain away the Circuit split by arguing the majority cases are inapposite because Plaintiffs did not suffer harm in their home forum. However, given Plaintiffs' allegations of harm in their home forum are accepted as true in the present procedural posture, this distinction goes nowhere. The recent *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. April 8, 2010) decision upholding jurisdiction involving internet defamation could not make the conflict starker. This Court should resolve the conflict in favor of the majority "individually targeted" test to ensure a home forum for Americans targeted for harm by out of forum actors.

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

In deciding the personal jurisdiction motion, the district court properly held a plaintiff "is entitled to have his allegations taken as true and all factual disputes drawn in his favor." App. B, page 8a. Thus, Defendants' efforts to "spin" the facts should be given no consideration. Rather, the following is assumed true:

First, Defendants "individually targeted" Plaintiffs with the *intention* of harming in their home forum in retaliation for their bringing *Norex* against Defendant Crown/Alfa. As the Third Circuit recognized:

> Seeking to kill two birds with one stone — to gain the upper hand in the public relations battle [against Telenor] and to extract revenge for the earlier [Norex] lawsuits — Altimo . . . distributed [the Releases] to the

> press . . . The [Releases] purported to identify a number of "illegal and inappropriate activities of Telenor" that were directed at Altimo management. . . . [The Releases] accused Telenor of engaging in a subversive public relations campaign directed, at least in part, by Marks . . . In addition, the letter attached two fabricated emails to support its accusations, one of which appeared to have been sent by plaintiff Bruce Marks . . .

Id. at 3a.

Second, the articles which Defendants procured on three websites did not merely contain "one statement" related to Plaintiffs.[1] Rather, as the Third Circuit stated:

> The [Release was] circulated to the press and was picked up by three Russian news organizations . . . Those organizations published to the internet articles repeating the allegations that . . . Marks had initiated a number of "ordered publications" — publications "obtained through bribery which appear[] as . . . news article[s], usually false, designed to . . . discredit a business competitor or blacken somebody's reputation."

Id. at 3a-4a.

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1. Defendants repeat six times that the websites are "unconnected" to them. However, it is irrelevant whether Defendants own the websites on which they procured publication of the Releases.

Third, Plaintiffs suffered the "brunt" (if not all) of the harm in Pennsylvania, where Marks resides and M&S maintains its only office from which the *Norex* work was done. [Rec. 1, Compl. ¶¶ 1-4, 13-14, Rec. 50, Decl. of B. Marks]. That M&S may have sister companies with offices in Moscow and Kyiv is irrelevant to where *Plaintiffs* suffered harm.

REPLY ARGUMENT

Defendants do not contest a state "has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985). Nor do they really dispute that internet technology has changed "modern commercial life," as *Burger King*, 471 U.S. at 476, foreshadowed. Their attempt to defend the Third Circuit test and obscure the Circuit split should be rejected.

A. The "Individually Targeted" Test Establishes No *Per Se* Rule of Jurisdiction

The "individually targeted" test adopted by seven majority Circuits does not establish a rule that there is always jurisdiction in a defamation case when the plaintiff is known to reside in the forum. Defamation "by definition" does not necessarily "individually target" the person defamed, contrary to Defendants' argument. Rather, a person may be defamed in an article whose focus is different. For example, *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002) denied jurisdiction because the focus was reporting on how Connecticut

prisoners were treated in Virginia, not the role played by the Virginia warden plaintiff. More importantly, the "individually targeted" test sustains jurisdiction because the defendants *intended* to harm the plaintiff in the forum. As *Dudnikov v. Chalk & Vermillion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008) explained:

> our case is an easier one than *Calder* itself. There, the defendants intended to write an article, the "focal point" of which was California, for the *Enquirer* to publish and distribute in California. 465 U.S. at 789. Yet, the effects of which the plaintiff complained likely were not bound up in the defendants' intentions. The defendant writer and editor were professionals presumably interested chiefly in the sale of newspapers, not in doing *intentional* harm to Ms. Jones; that is, while they *knew* their article would have adverse effects on her in California, those effects were to them perhaps no more than foreseeable side-effects. By contrast, defendants here more than foresaw or knew the harm alleged to have befallen forum residents; indeed, they do not dispute that they *intended* to cause the cancellation of plaintiffs' auction . . . *[A]ctions that "are performed for the very purpose of having their consequences felt in the forum state" are more than sufficient to support a finding of purposeful direction under Calder.*

Id. at 1077-78 (emphasis added).

In short, the "individually targeted" test is narrowly drawn to sustain jurisdiction where a defendant *intends* to harm the plaintiff within the forum.

B. The Third Circuit Does Not Correctly Apply *Calder*

Defendants do not dispute that this matter was dismissed because of the Third Circuit's narrow interpretation of *Calder* which requires (1) communications be directed to the forum; (2) communications refer to the plaintiff's forum conduct; and/or (3) a "unique relationship" exist between the plaintiff's profession and the forum. However, such requirements are not supported by *Calder*.

First, seven Circuits hold that there is no requirement that communications be directed to the forum if the defendant *intended* to harm the plaintiff in the forum. The key to *Calder* was the defendants' foreseeability of causing harm in California because of the *National Enquirer's* circulation there, based on technology at the time. Today, internet publication is more egregious than forum based "paper" media because it intentionally reaches a broader audience and can be permanent.[2]

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2. Defendants make ado about the internet publications being read outside of the United States. However, the issue is whether out of forum publication which is intended to cause harm within the forum satisfies *Calder*. If so, it makes no difference in which out of forum location publication occurs, whether foreign or domestic

Second, Defendants make no principled argument that *Calder* conditions personal jurisdiction on the content of defamatory speech. In *Calder*, Jones' harm was suffered by the *nature* of the accusations, not because the alleged excess drinking necessarily occurred in California. Defendants' distinction that the website articles do not refer to forum based conduct or sources, like *Calder*, is irrelevant; after all, there were *no* conduct or sources –Defendants' allegations and emails were fabricated.[3] It makes no sense to sustain jurisdiction only if a plaintiff is the subject of defamation regarding forum conduct, but not when the defamation concerns even more egregious harmful out of forum allegations, as here.[4]

Third, Defendants make no attempt to defend the requirement that there be a "unique relationship" between plaintiffs and forums (even though they argued it below); this was relevant in *Calder* only to establish the foreseeability of harm in the pre-internet era because California based industry decision-makers were likely to read the *National Enquirer* there.

In sum, *Calder* does not support the Third Circuit's "effects plus" test.

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3. The dissent in *Clemens v. McNamee*, 2010 U.S.App. LEXIS 16718 (5th Cir. 2010), a minority circuit case, trenchantly explains why whether "the defamatory statements concerned the forum" and "the sources . . . were in the forum" are irrelevant under *Calder*.

4. Defendants' assertion that publication in Russian language websites makes jurisdiction less likely has it exactly opposite. By publishing in Russian, Defendants deliberately targeted Plaintiffs' client audience, in Pennsylvania and elsewhere.

C. The Minority "Effects Plus" Test Conflicts With Seven Majority Circuits Which Do Not Require Communications Be Directed Into the Forum

Defendants concede that the majority Circuits impose no requirement that personal jurisdiction be conditioned on the content of speech or a "unique relationship" between the plaintiff's profession and the forum. Instead, Defendants attempt to white-wash the conflict by arguing Plaintiffs were not harmed in Pennsylvania and various irrelevant distinctions. On the facts of this case, all majority Circuits would have sustained jurisdiction, as recently illustrated by *Tamburo*.

Expressly adopting *Dudnikov*, *Tamburo* sustained jurisdiction over defendants who "purposely targeted Tamburo and his business in Illinois with the express goal of inflicting commercial and reputational harm on him there, even though their alleged defamatory and otherwise tortious statements were circulated more diffusely through [publications on] the internet." *Id.* at 707. "Tortious acts aimed at a target in the forum state and undertaken for the express purpose of causing injury there are sufficient to satisfy *Calder's* express-aiming requirement." *Id.* at 707.[5] In contrast, the Third Circuit would have declined jurisdiction because the internet communications were not primarily directed at Illinois and there was no unique relationship between

5. Defendants attempt to distinguish *Tamburo* asserting "the defendant sent blast emails". However, only one of many defendants over which jurisdiction was sustained sent such emails.

Tamburo's "dog pedigree software" and the forum.[6] The Third Circuit's test conflicts with the seven Circuits listed below.

1. First Circuit

Northern Laminate Sales, Inc. v. Davis, 403 F.3d 14, 26 (1st Cir. 2005) sustained jurisdiction because Davis made misrepresentations outside of the forum which he knew would be relied upon and cause harm in the New Hampshire forum. Citing *Calder*, the court sustained jurisdiction because of Davis "knowing full well that his statements . . . would likely cause financial injury [in the forum state]." While Defendants argue that Davis sent a bad check and mail into the forum, this was irrelevant to the court's decision, which relied on the subsequent out-of-forum statements. *Id* at 26-27.

2. Fourth Circuit

First American First, Inc. v. Nat'l Assoc of Bank Women, 802 F.2d 1511, 1517 (4th Cir. 1986) reversed dismissal over defendants who circulated defamatory letters outside of plaintiffs' home state throughout the country, with the intent of interfering with plaintiffs' business in the forum, holding the defendant "knew . . .

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6. *See Remick v. Manfredy*, 238 F.3d 248 (3rd Cir. 2001) (denying jurisdiction because publications about forum based attorney were not circulated solely within the forum and no unique relationship existed between attorney's profession and forum); *Marten v. Godwin*, 499 F.3d 290 (3rd Cir. 2007) (denying jurisdiction because letter about forum resident was circulated outside the forum).

that its allegedly defamatory letters would inflict the greatest injury upon Leake in the state in which he resided and conducted his business." To the extent the defendant sent letters within the forum, as Defendants argue, this was irrelevant to *First American's* holding which sustained jurisdiction based on the defendant's intent to cause harm within the forum through out-of-forum letters which individually targeted the forum resident. Defendants' factual argument that they did not intend to harm Plaintiffs in Pennsylvania misses the mark; Plaintiffs' allegations are presumed true. In *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), there was no allegation that the newspaper's *intent* was to harm the warden in Virginia.

3. Seventh Circuit

Janmark, Inc. v. Reidy, 132 F.3d 1200, 1202 (7th Cir. 1997) held "there can be no serious doubt after *Calder v. Jones* . . . that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor." In attempting to distinguish *Janmark*, Defendants argue the facts as to where Plaintiffs were harmed, an irrelevancy given Plaintiffs' allegations are accepted as true. *Tamburo* concluded *Janmark* "was premised on the Illinois-based injury *and* the fact that the defendant acted with the purpose of interfering with sales originating in Illinois. Thus, despite its broad language, *Janmark* ultimately considered the relationship between the allegedly tortious conduct and the forum state itself." *Tamburo*, 601 F.3d at 706.

4. Eighth Circuit

Dakota Industries, Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1390-91 (8th Cir. 1991), reversed dismissal where plaintiff sued defendant for trademark infringement, holding that *Calder* "approved an 'effects test' that allows the assertion of jurisdiction over non-resident defendants whose acts are performed for the very purpose of having their consequences felt in the forum state." Defendants do not contest *Dakota* permits jurisdiction when the acts are performed outside of the forum. *Hicklin Engineering, Inc. v. Aidco, Inc.*, 959 F.2d 738 (8th Cir. 1992) does not contradict *Dakota*. *Hicklin* merely held that when companies, like Aidco, "solicit the customers of its competitors, it necessarily wishes to have customers believe that its products are superior and to place its competitor's products in a less favorable light . . . absent additional contacts, this effect alone will not be sufficient to bestow personal jurisdiction." *Hicklin*, 959 F.2d at 739. Instantly, Defendants are not accused of acting for some proper business purpose; they deliberately attempted to harm Plaintiffs in their home forum in retaliation for *Norex*.

5. Ninth Circuit

Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998) and *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082, 1087-88 (9th Cir.2000) carefully developed the "individually targeted" test, with *Bancroft* holding:

> when the defendant is alleged to have engaged in wrongful conduct targeted at a

> plaintiff whom the defendant knows to be a resident of the forum state ... *"express aiming" encompasses wrongful conduct individually targeting a known forum resident ... The letter was expressly aimed at California because it individually targeted B&M, a California corporation doing business almost exclusively in California.*

(emphasis added).

The *Panavision/Bancroft* "individually targeted" test is hardly "doubtful authority" in the Ninth Circuit, particularly given *Menken v. Emm*, 503 F.3d 1050, 1059 (9th Cir. 2007), which reaffirmed that "expressly aimed at the forum state . . . requirement [is] satisfied 'when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.'" *Menken* was decided after *Schwartzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004), where there was no allegation that the defendant *intended* to harm the plaintiff in his home forum, despite using his image without permission.

6. Tenth Circuit

Dudnikov, 514 F.3d at 1075-78, sustained jurisdiction even though the communication at issue was not directed within the forum, holding:

> [While the communication] formally traveled only to California, it can be fairly characterized as an intended means to the further intended

> end of cancelling plaintiffs' auction in Colorado. In this way, it is something like a bank shot in basketball. A player who shoots the ball off of the backboard intends to hit the backboard, but he does so in the service of his further intention of putting the ball into the basket . . . *Their "express aim" thus can be said to have reached into Colorado in much the same way that a basketball player's express aim in shooting off of the backboard is not simply to hit the backboard, but to make a basket . . . [A]ctions that "are performed for the very purpose of having their consequences felt in the forum state" are more than sufficient to support a finding of purposeful direction under Calder.*

(emphasis added).

Defendants' attempt to distinguish *Dudnikov* rests solely on the misguided factual argument that Plaintiffs did not sustain the "brunt" of their harm in the forum.

7. Eleventh Circuit

Licciardello v. Lovelady, 544 F.3d 1280, 1288 (11th Cir. 2008), applying *Calder* within the internet setting, held that communication need not be directed to the forum in order to sustain personal jurisdiction:

> The unauthorized use of Carman's mark, therefore, individually targeted Carman in order to misappropriate his name and reputation for commercial gain. *These*

> *allegations satisfy the Calder effects test for personal jurisdiction — the commission of an intentional tort, expressly aimed at a specific individual in the forum whose effects were suffered in the forum.*

(emphasis added) Again, Defendants' attempt to distinguish is based on the misguided factual argument that Plaintiffs were not harmed within the forum.

CONCLUSION

Certiorari is warranted to resolve a split between the Circuits and confirm personal jurisdiction under *Calder* may be sustained when defendants commit intentional torts which "individually target" forum residents for harm *intended* to be inflicted in the forum in order to protect the fundamental right of states to provide a forum for residents to redress intentional harm caused by out of forum actors.

Respecfully submitted,

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